1105A MANAGEMENT AND CONTROL – EMERGENCY

When you consider negligence as to management and control, bear in mind that a driver may suddenly be confronted by an emergency, not brought about or contributed to by (his) (her) negligence. If that happens and the driver is compelled to act instantly to avoid collision, the driver is not negligent if (he) (she) makes a choice of action or inaction that an ordinarily prudent person might make if placed in the same position. This is so even if it later appears that (his) (her) choice was not the best or safest course.

This rule does not apply to a person whose negligence wholly or in part created the emergency. A person is not entitled to the benefit of this emergency rule unless (he) (she) is without fault in creating the emergency.

You should consider this emergency rule only when you determine whether (name) was negligent as to management and control.

COMMENT

This instruction was approved in 1995 and revised in 2008 and 2015. An earlier version of this instruction was previously numbered Wis JI-Civil 1015. The comment was updated in 1999, 2009, and 2016.

The emergency doctrine is a rule which precludes a finding of negligence when the person is confronted with an emergency. For the doctrine to apply:

(1) the party seeking its benefits must be free from the negligence which contributed to the creation of the emergency;
(2) the time element in which action is required must be short enough to preclude the deliberate and intelligent choice of action;
(3) the element of negligence inquired into must concern management and control.

Edeler v. O'Brien, 38 Wis.2d 691, 697, 698, 158 N.W.2d 301 (1968); Menge v. State Farm Mut. Automobile Ins. Co., 41 Wis.2d 578, 582, 583, 164 N.W.2d 495 (1969); Leckwee v. Gibson, 90 Wis.2d 275, 288, 280 N.W.2d 186 (1979).

In Totsky v. Riteway Bus Service, Inc., 233 Wis.2d 371, 607 N.W.2d 637 (2000), the trial court decided that the emergency doctrine can never absolve a party of a violation of a safety statute. The court of appeals and supreme court disagreed.

The supreme court said the emergency doctrine can apply to the violation of a safety statute, excusing what otherwise would be negligence per se, but only in situations where the three required tests of emergency are met.

The "emergency doctrine" was at issue in Leckwee v. Gibson, supra, wherein the court, discussed prevailing Wisconsin law on the doctrine:

> The plaintiff argues that he could not properly be found negligent as to management and control, invoking the principles of the emergency doctrine. The emergency doctrine, recently summarized in Tombal v. Farmers Ins Exchange, supra, 62 Wis.2d at 70, states:
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> The doctrine, as stated in Papacosta v. Papacosta, 2 Wis.2d 175, 85 N.W.2d 790 (1957), is that a person faced with an emergency which his conduct did not create or help to create is not guilty of negligence in the methods he chose, or failed to choose, to avoid the threatened disaster if he is compelled to act instantly without time for reflection. Seif v. Turowski, 49 Wis.2d 15, 23 181 N.W.2d 388 (1970).

See also Lutz v. Shelby Mut. Ins. Co., 70 Wis.2d 743, 235 N.W.2d 426 (1975).

To determine whether the emergency doctrine should be given or whether in certain cases it should be given as to one driver but not as to the other, see Gage v. Seal, 36 Wis.2d 661, 154 N.W.2d 354 (1967); Geis v. Hirth, 32 Wis.2d 580, 146 N.W.2d 459 (1966); Metz v. Rath, 275 Wis. 12, 18-19, 81 N.W.2d 34 (1957); Ackley v. Farmers Mut. Auto Ins. Co., 273 Wis. 422, 425-26, 78 N.W.2d 744 (1956); Misiewicz v. Waters, supra; Krause v. Milwaukee Mut. Ins. Co., 44 Wis.2d 590, 604-06, 172 N.W.2d 181 (1969); Hardware Mut. Casualty Co. v. Harry Crow & Son, Inc., 6 Wis.2d 396, 405, 94 N.W.2d 577 (1959).

Since this instruction relieves a driver who is confronted with an emergency from being labeled negligent in connection with his manner of driving, i.e., his or her management and control, it should not be given unless that driver's management and control are at issue. Schmit v. Sekach, 29 Wis.2d 281, 289, 139 N.W.2d 88 (1966); Menge v. State Farm Mut. Automobile Ins. Co., 41 Wis.2d 578, 582-84, 164 N.W.2d 495 (1969), see also Lievrouw v. Roth, 157 Wis.2d 332, 459 N.W.2d 850 (Ct. App. 1990).

The emergency doctrine is directed to the question of negligence rather than the question of causation. Kuentzel v. State Farm Mut. Auto Ins. Co., 12 Wis.2d 72, 76, 106 N.W.2d 324 (1960).

In Garceau v. Bunnel, 148 Wis.2d 146, 434 N.W.2d 794 (Ct. App. 1988), the court of appeals said that the testimony did not support the conclusion that an insect striking the driver of a vehicle created an emergency situation. However, in a footnote, the court recognized there may be situations in which an insect sting or bite might create an emergency. See 148 Wis.2d at 154 n. 2.

Use in Non-Motor Vehicle Cases. For the adaptation of this instruction to a case not involving a motor vehicle, see McCrossen v. Nekoosa Edwards Paper Co., 59 Wis.2d 245, 208 N.W.2d 148 (1973); see also Kelly v. Berg, 2015 WI App 69, 365 Wis.2d 83, 870 N.W.2d 481.

Rescue Rule. For a discussion of both the emergency doctrine and the rescue rule, see Kelly v. Berg, supra.